IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.785 OF 2005
IN
SUIT NO.493 OF 2000

Pushpa Rasiklal Vora. ..Plaintiff.

V/s.

Girish Nyhalchand Matalia & Ors...Defendants.

Mr. Shailesh Shah i/b Mansukhlal Hiralal for applicants.

Mr.Pankaj Sawant i/b Joy Legal for defendant No.1.

Mr.Dilip Rai i/b Rawal Shah & Asso. for defendant No.2.

Mr.S.R.Rawal, interpreter & S.M.S.G.Khan, Asstt. Chief.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 17, 2005.

P.C. :

1. Pursuant to order dated July 26, 2005, Mr.M.M.Rawal, Interpreter of the High court and Mr. S.M.S.G.Khan, Asstt. Chief Translator have appeared in court and explained the circumstances, in which the affidavit in question dated 22nd June, 2005, sworn by Pushpa Rasiklal Vora was completed by them at the residence of Pushpa Vora.

2. After hearing explanation offered by the officers of the Court, counsel for the defendant

No.1, on instruction fairly states that the defendant No.1 will not press the argument regarding the manner in which the said affidavit has been executed. Mr. Sawant, counsel for the defendant No.1 however, contends that the allegations made by the defendant No.1 that the affiant was not in a position to execute the affidavit are not pressed by the defendant No.1, in view of the explanation offered by the officers in open court. He submits that however, that will not take care of the objection taken on behalf of the defendant No.1 that the affidavit is defective as it is not in conformity with Rule 199 of the High Court Original Side Rules, which postulates that noting has to be made on the affidavit by the officer that affidavit has been executed at the residence and outside the court house, which is lacking in the present case. The officer has fairly accepted that such endorsement remained to be made though in fact, affidavit was sworn at the residence of Pushpa Rasiklal Vora, when she was found in sound condition and good health condition. This statement made by the Officers is not challenged. As the officers have failed to make necessary noting in terms of Rule 199 of High Court Original Side Rules due to inadvertence, that endorsement is permitted to be made on affidavit, as defendant No.1 has insisted

that the said endorsement should be made on the affidavit.

3. Heard counsel on merits. Perused the pleadings and the affidavits filed in support and opposition of the present application.

4. In so far as, amendment sought in terms of paragraph-1 to 6 of Schedule-I are concerned, in my opinion, the same are only to carry out clerical errors occurring in the plaint as filed. In as much as, instead of year 1992, it should read as 1989. It is stated in the affidavit in support of the application that this mistake has crept in due to inadvertence and oversight. There is no reason to doubt the explanation offered by the plaintiff in this behalf. Besides, if such amendment is permitted, it will neither change the nature or frame of the suit nor claim of the plaintiff. No prejudice will be caused to the defendants, if amendment in terms of Paragraph 1 to 6 of the Schedule is allowed to be carried out.

5. In so far as, the amendment in terms of paragraph 7 of Schedule I, Counsel for the defendants contends that the same cannot be permitted because

the plaintiff will introduced new case, which is in fact contrary to the stand taken by the plaintiff, on the earlier occasion during the course of Notice Of Motion No.376 of 2000, which is recorded in Order dated 1st February, 2001. In the proposed amendment, the plaintiff intends to assert that the defendant No.2 alongwith his family was and is still residing at his residential premises at 501, Saidarshan, Chappal Lane, S.V.Road, Santacruz(West), Mumbai 400 057. It is further stated in paragraph No.24 E-1 that the plaintiff submits that the suit flat was lying vacant till October, 2000. This assertion according to the defendants are clearly inconsistent and contrary to the stand taken on behalf of the plaintiff before this court, as is recorded in order dated 1st February, 2000. It is mentioned in the said order that it is the case of the plaintiff that since January, 1988, defendant No.2 is in possession of the flat and is not paying outgoings. That case was accepted by this court on which basis, the defendant No.2 was directed to pay outgoings, demanded by the plaintiffs. In fact, after the said order was passed, plaintiff demanded outgoings, which were paid by the defendant No.2. There is substance in the submission canvassed on behalf of the defendant that if the plaintiff is allowed to amend

the plaint as per the proposed amendment, that would enable the plaintiff to introduce new case as well as cause of action against the defendants.

6. In so far as the relief of mesne profit is concerned on the assertion in the proposed amendment, which has been objected by the counsel for the defendants, in my opinion, the other proposed amendment will not change the cause of action or cause any prejudice to the defendants as defendants would be entitled to file additional written statement to counter the case of the plaintiff, as per the amendment.

7. Accordingly, chamber summons is allowed on condition that the plaintiff is permitted to carry out amendment in terms of paragraph-1 to 6 of Schedule I and paragraph-7, 8 and 9 except bracketed portion in proposed paragraph-24 E-1, which reads thus -

> "The Defendant No.2 along with his family was and is still residing at his residential premises at 501, Saidarshan, chappal Lane, S.V.Road, Santacruz (West), Mumbai 400 057. The plaintiff submits that the suit flat was

lying vacant till October 2000."

Amendment to be carried out within four weeks. No order as to costs.

8. It is made clear that it will be open to the defendants to file additional written statement after plaint is amended, in terms of this order. All questions are left open.

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.411 OF 2005
IN
SUIT NO.493 OF 2000

Pushpa Rasiklal Vora. ..Plaintiff.

V/s.

Girish Nyhalchand Matalia & Ors...Defendants.

Mr. Shailesh Shah i/b Mansukhlal Hiralal for applicants.

Mr.Pankaj Sawant i/b Joy Legal for defendant No.1.

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Mr.S.R.Rawal, interpreter & S.M.S.G.Khan, Asstt. Chief.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 17, 2005.

P.C. :

1. Heard counsel for the parties.

2. Chamber summons is made absolute in terms of prayer clause (a), leaving all contentions about the merits of the stand taken, to be decided at the appropriate stage. Amendment to be carried out within four weeks.